Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1683

NATIONAL BARREL AND DRUM ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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1. *For the first time since the 1975 amendment to the Hobbs Act, this Court has been asked to review the effect of that amendment on the necessity for the ICC to consider the environmental and energy impact of an order permitting a tariff provision to go into effect without suspension or hearing. Conventional attitudes barring judicial review of such actions were based on three policy principles summarized in* Arrow *and* SCRAP. *These policy principles were rendered inapplicable to this proceeding by the '75 Amendment or never did apply. The ICC's obligation to review the environmental and energy impact thus remains unimpeded and unimpaired and it is error for the Court below to decline, in a summary fashion, to consider a Petition for Review seeking to have that duty enforced. The Decision below was squarely in conflict with two landmark decisions by this Court and with the provisions of the National Environmental Policy Act and the Energy Policy and Conservation Act*	6

A. *The risk of contradictory or diverse results if multiple District Courts could review the same ICC Order was the principal public policy imperative identified by this Court in both* Arrow *and* SCRAP *as the reason for concluding that a three-judge District Court lacked jurisdiction to review an ICC Order which was attacked for violdtion of NEPA. As a result of the enactment in 1975 of P.L. 93-584, however, only one U.S. Circuit Court of Appeals now may review an ICC Order. Thus the feared risk has disappeared and with it, the basis for the Court's refusal to review. The effect of this critical new legislation on the reviewability of ICC Orders of the kind here under consideration has never been, but should now be determined by this Court* 10

B. *The remaining two policy considerations cited by this Court in* Arrow *and* SCRAP *are not present in this case and the extension of these policies to this tariff classification undermines the integrity and rationale of the decisions in* Arrow *and* SCRAP 12

II. *The decision below, in the form of a one sentence pronouncement rather than a reasoned decision, was totally unfair to Petitioner and fosters confusion as to the significance of P.L. 93-584 relative to appeals of ICC Orders. The Supreme Court should, therefore, exercise its power of supervision and conclusively determine, in a reasoned opinion, the merits of the issues presented by Petitioner* 14

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Petitioner National Barrel and Drum Association respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on February 4, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on February 4, 1977. A timely Petition for Rehearing *en banc* was denied on March 15, 1977, and this Petition for Certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(I).

QUESTIONS PRESENTED

1. Whether the reach of the National Environmental Policy Act of 1969 (NEPA) and the Energy Policy and Conservation Act of 1972 (EPCA) should be uniquely denied to a major Federal action of the Interstate Commerce Commission which permitted the use of thin-walled, non-reconditionable steel drums in interstate commerce simply because the Order of the ICC authorized the effectiveness of a tariff amendment without investigation instead of suspending its effectiveness and setting it down for investigation and public hearing before authorizing it.

2. Whether the Interstate Commerce Commission, in authorizing the widespread use of thin-walled, non-reconditionable steel drums, should be relieved from considering the environmental and energy impacts of such action by a proper Environmental Impact Statement under NEPA and by an Energy Conservation Impact Statement under EPCA.

3. Whether the propriety of such an action by the Interstate Commerce Commission in summarily approving thin-walled steel drums to carry liquids, including liquid chemicals, in interstate commerce should escape review by the Federal Courts, relying on *Arrow* (1963)[1] and *SCRAP* (1973)[2] now that § 2325 of Title 28 U.S.C. has been repealed and § 2321 of Title 28 U.S.C. has been promulgated (in 1975) effectively directing that all judicial review of a single ICC Tariff issue, such as the one involved herein, be heard by one U.S. Circuit Court of Appeals, the one to which the issue was first presented.

STATUTORY PROVISIONS INVOLVED

National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c).

Energy Policy and Conservation Act, 42 U.S.C. § 6362(b).

Interstate Commerce Act § § 216(g) and 15(7); 49 U.S.C. § § 316(g) and 15(7).

28 U.S.C. § § 2325, 2321 and 2349(a).

(The above-cited provisions are set out verbatim in the Appendix hereto).

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[1] *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U.S. 658(1963)

[2] *United States v. Students Challenging Regulatory Agency Procedures* ((SCRAP), 412 U.S. 669(1973)

STATEMENT OF THE CASE

By Supplement No. 10 to the National Motor Freight Classification NMF 100-C (the Supplement) filed with the Interstate Commerce Commission (ICC or Commission) to become effective on 8 October 1976, the National Motor Freight Traffic Association, Inc. (Traffic Association) sought to amend Item 260 to change the minimum specifications for steel drums acceptable in interstate commerce for the transportation of liquids, including liquid chemicals, by motor common carriers of property for hire which were subject to the jurisdiction of the Commission and were parties to that tariff (see App. A). The Supplement, which is now in effect, authorizes the use of a 55-gallon steel drum, the standard size in the industry, which would be constructed completely from light-weight, 20-gauge steel. The Supplement made no changes in any rates or charges or in any way affected the rates to shippers or of carriers for shipping traffic moving in such containers. The Supplement changed only the description. Prior to the effectiveness of this Supplement, the lightest drum of this type permitted by the Classification was one having 20-gauge sides and 18-gauge ends. An all-20-gauge drum unlike the drum with 20-gauge sides and 18-gauge ends, cannot be reconditioned. Moreover, an all-20-gauge drum cannot withstand the rigors of motor transportation. Consequently, the authorized use of an all-20-gauge, 55-gallon steel drum will cause the proliferation of non-reusable drums with corresponding adverse economic, environmental and energy-related impacts.

National Barrel and Drum Association (NBDA) first presented these economic, environmental and energy-related impacts at public hearings held on 27 January 1976 by the National Classification Board (the Board). The Board in its

decision to permit the Traffic Association to propose the Supplement merely stated, "Consideration has been further given to the drums' ability to be reconditioned and its overall effect upon our environment in terms of energy and solid waste." (Disposition Bulletin No. 291 of the National Classification Board, 10 June 1976, p. 3) (App. C). The Association published the tariff to become effective 8 October 1976.

NBDA filed a protest to the proposed Supplement with the ICC Board of Suspension on 27 September 1976. In Board of Suspension Case No. 65597, the protest again raised and documented the adverse energy and environmental impacts which would result from the Supplement, and petitioner requested that the Supplement be suspended pending the preparation of an Environmental Impact Statement under Section 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. §4332(2)(c), and an Energy Impact Statement under §382(b) of the Energy Policy and Conservation Act, 42 U. S.C. §6362(b).

The Board of Suspension summarily denied NBDA the relief it requested. On 6 October 1976, NBDA petitioned Division 2 of the I.C.C. for reconsideration. The Petition for Reconsideration was denied by Division 2 on 7 October 1976, the day after it was filed (App. D). There is no further administrative remedy available to NBDA to prevent the Supplement from becoming effective.

On 6 December 1976, therefore, NBDA filed a Petition for Review in the United States Court of Appeals for the District of Columbia in Civil Action No. 76-2091 under 28 U.S.C. §§ 2321(a), 2342(5) and 2344 and 2349, seeking review and reversal of the Commission's decision to allow the aforementioned Supplement to become effective. Also, in

order to prevent the occurrence of irreparable harm to NBDA, its members, and the environment, petitioner filed a motion with the Court of Appeals requesting a grant of a preliminary injunction. On 4 February 1977, however, Circuit Judges MacKinnon and Robb, deciding for the Court of Appeals, summarily dismissed NBDA's Petition for Review and found the Motion for a Preliminary Injunction moot and denied it (App. E).

On 18 February 1977, Petitioner filed a Motion with the Court of Appeals for a rehearing with the suggestion that the matter be reheard *en banc*. Circuit Judges MacKinnon and Robb, deciding for the full panel, again in a one sentence opinion, denied Petitioner's motion on 15 March 1977 (App. F).

REASONS FOR GRANTING THE WRIT

I. *For the first time since the 1975 amendment to the Hobbs Act, this Court has been asked to review the effect of that amendment on the necessity for the ICC to consider the environmental and energy impact of an order permitting a tariff provision to go into effect without suspension or hearing. Conventional attitudes barring judicial review of such actions were based on three policy principles summarized in* Arrow *and* SCRAP. *These policy principles were rendered inapplicable to this proceeding by the '75 Amendment or never did apply. The ICC's obligation to review the environmental and energy impact thus remains unimpeded and unimpaired and it is error for the Court below to decline, in a summary fashion, to consider a Petition for Review seeking to have that duty enforced. The Decision Below was squarely in conflict with two landmark decisions by this Court and with the provisions of the National Environmental Policy Act and the Energy Policy and Conservation Act.*

NEPA is a pervasive, all-embracing statute. It is one of the most sweeping pieces of legislation ever enacted by the Congress and affects the actions of every Federal agency. Judicial review of such agency actions, since the enactment of this Statute, uniformly supports this conclusion. Even the regulations of the agencies reflect the broad requirements of NEPA.

NEPA requires, in particular, at Section 102:

> [a]ll agencies of the Federal government ... [to] include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed [environmental impact] statement...

In order to facilitate this mandate, an agency of the Federal government must incorporate NEPA's requirements into its decision-making process, in that it must issue an Environmental Impact Statement (EIS) on any action by that agency which would significantly affect the quality of the human environment. Specifically, in *Arizona Public Service Co. v. Federal Power Commission*, 483 F.2d 1275, 1282 (D.C. Cir. 1973), the Court of Appeals for the District of Columbia stated:

> NEPA makes environmental protection part of the mandate of every federal agency, and each is not only permitted but, compelled to take environmental values into account. *Calvert Cliffs*

Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

The Ninth Circuit has further emphasized the point that NEPA requirements for the consideration of environmental concerns are not to be taken lightly. As pertinent, it stated:

> The procedures required by NEPA, 42 U.S.C. §4332(2)(C), are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed: grudging *pro forma* compliance will not do. *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974).

See also, *Scientists Institute For Public Information v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973).

In view of the force established by NEPA, it is apparent that any excuse for noncompliance by an agency such as the ICC must be based upon specific Congressional expression and not on agency inconvenience. *Natural Resources Defense Council, Inc. v. Callaway*, 389 F.Supp. 1263 (D.C. Conn. 1974). Moreover, it is the important function of the Courts to review the action of Federal agencies under NEPA and insure proper compliance therewith.

Notwithstanding the policy of presumption of reviewability of Federal agency actions, *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), the Federal District Courts sometimes have been reluctant to review certain ICC Orders authorizing rates to become effective without suspension and investigation to determine their compliance with NEPA.

In *SCRAP* this Court articulated the considerations, adopted specifically from *Arrow*, which the Court concluded made it inappropriate for the District Courts to review an ICC non-suspension order, either on its own merits or on the issue of compliance with NEPA in the face of the law *as it stood at that time*. Specifically, this Court in *SCRAP* cited three public policies which were identified in *Arrow*, as the reasons Section 15(7) (and therefore §216(g) also)[3] of the Interstate Commerce Act (49 U.S.C. 15(7)) was enacted and which would be substantially undermined if the District Courts were found to have suspension power in cases where an EIS (or impliedly an Energy Conservation Impact Statement) was required. These three were (a) to avoid the chance of diverse results in different District Courts which might occur if, for example, an ICC authorized rate increase was allowed by a District Court in New York but disallowed by one in New Jersey, (b) not to disturb the balance of financial interests of either shippers or carriers, i.e., of carriers in *keeping the increased revenues* which the new rates would generate, or the interest of shippers in *receiving a repayment* of the portion of the increased revenues which the Commission might require the carrier to repay, and (c) to avoid interfering with the timely exercise of the Commission's power of rate suspension inasmuch as an injunction would directly interfere with the *timing* of the decision as to when *rates* were to go into effect.

These judicial policy considerations, however, are not present in this particular case. Because they are nonexistent in

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[3] §15(7) is the same in every material respect as §216(g). The only difference is that §15(7) applies to rail rates and charges and 216(g) applies to motor carrier rates and charges.

this case, the attempt by the Court below to impose them nonetheless marks an unjust departure from, and a decision in conflict with, the holdings and rationale of this Court in *SCRAP* and *Arrow*.

> *A. The risk of contradictory or diverse results if multiple District Courts could review the same ICC Order was the principal public policy imperative identified by this Court in both* Arrow *and* SCRAP *as the reason for concluding that a three-judge District Court lacked jurisdiction to review an ICC Order which was attacked for violation of NEPA. As a result of the enactment in 1975 of P.L. 93-584, however, only one U.S. Circuit Court of Appeals now may review an ICC Order. Thus the feared risk has disappeared and with it, the basis for the Court's refusal to review. The effect of this critical new legislation on the reviewability of ICC Orders of the kind here under consideration has never been, but should now be determined by this Court.*

In *SCRAP* it was concluded that the principle of avoiding the risk of diverse results by separate District Courts was the fundamental reason the District Courts did not have jurisdiction to review an ICC rate suspension, even when the Commission's failure to follow NEPA (and impliedly the Energy Policy and Conservation Act) was alleged, for the reason that, "a suit to enjoin a national rate increase on NEPA grounds could be brought in any Federal district court in the country". *United States v. SCRAP, supra,* 696. The Court then cited as authority for that crucial statement, Sections of the Motor Carrier Act and of Title 28, *then applicable* to review procedures of the Commission's orders.

A fundamental jurisdictional change in the procedures for seeking review or an injunction of a Commission order, however, was made by the Congress between the date of *SCRAP* (June 1973), and the date NBDA sought its remedy at the Commission in this case (September 1976). That change removed any risk that different District Courts might reach diverse results on review of the same rate suspension order.

The change was effected by the recent amendment to the Hobbs Act in P.L. 93-584, effective 2 January 1975. There, the Congress repealed Section 2325 of Title 28 U.S.C. and amended Section 2321 of Title 28 U.S.C. providing, *inter alia*, that a proceeding brought to enjoin or review an agency action such as this one which involved a tariff description, must be brought in a U.S. Court of Appeals. The legislative history of this statutory change makes this effect clear. In H.R. Rep. No. 1569, 93d Cong., 2d Sess., reprinted in [1974] *U.S. Code Cong. & Ad. News* 7025, 7033, it is stated:

> If review of ICC orders were placed under the Hobbs Act, the following procedural advantages would obtain:
>
> (1) *The problem of multiple suits* challenging a single ICC order in different courts, *would disappear and with it the potential for disparity in results and nonuniformity*. S.663 amends sections 1136(a) and 2321 of Title 28, United States Code, to vest *exclusive* jurisdiction in the Court of Appeals in which the agency record is *first* filed. (Emphasis added)

Additionally, judicial review of this ICC tariff description is subject to 28 U.S.C. § 2349(a), providing that the Circuit

Court in which the record is first filed has exclusive jurisdiction to enjoin, set aside or suspend such an order of the ICC. Inasmuch as the U.S. Court of Appeals for the District of Columbia, where this case was filed, is the only Court of Appeals which could consider this change of classification and the ICC's compliance with NEPA, there could only be *one* result. The fear of diverse decisions, then, was eliminated and with it, the fundamental reason this Court has held that the District Courts lack jurisdiction in the premises.

This basic jurisdictional alteration in means of judicial review of ICC orders will have a substantive impact on the entire body of ICC law. We perceive that one of the clearest changes that it effects is on the policy of reviewability of non-suspension orders for failure to observe NEPA and EPCA. This case is the first instance where that fundamental issue has been raised. As such, its resolution will affect the future determination of countless ICC proceedings and the rights of shippers, carriers and the general public. The issue has never been raised before and, we submit, should be considered now by this Court and its effect on ICC law and procedure should be determined for the guidance of the Commission, the bar, the transportation community and the general public.

B. The remaining two policy considerations cited by this Court in Arrow *and* SCRAP *are not present in this case and the extension of these policies to this tariff classification undermines the integrity and rationale of the decisions in* Arrow *and* SCRAP.

The second public policy imperative motivating this Court in *Arrow* and *SCRAP* was its concern that "to allow judicial suspension for non-compliance with NEPA would disturb this careful balance of interest". *United States v.*

SCRAP, supra, 697. The interests being balanced were two: the interest of carriers in *keeping the increased revenues* which the rates involved in those cases would produce and the interest of shippers in *obtaining a refund* of any portion of the new rates which the ICC would disallow.

It is clear that this proceeding involves a proposed change in a container *description* in the National Motor Freight Classification, not an increase in rate levels. No revenue change affecting any carrier or shipper is present here. This case is simply a description change which, however, will have a substantial national environmental impact by permitting a new thin-walled steel container to be used in transporting commodities in interstate commerce which are subject to this tariff. No changes in transportation charges will result. The only resulting financial loss will be to the members of NBDA which will be put out of business since there will eventually be an insufficient inventory of suitable steel drums for them to recondition. Neither carriers nor shippers will be financially affected by this new description of permissible steel drum containers.

Accordingly, those interests of shippers and carriers in transportation rates and revenue levels which were protected by *Arrow* and *SCRAP* are nonexistent here. Therefore, the second policy consideration relied on in *Arrow* and *SCRAP* is also absent.

The third concern expressed by this Court in *Arrow* and *SCRAP* was to avoid interfering with the timely exercise of the Commission's power of suspension. The Court illustrated this principle in *SCRAP* with a quote from *Arrow* as follows: "Congress meant to foreclose a judicial power to interfere with the *timing* of rate *levels* fostered by the

doctrine of primary jurisdiction. 372 U.S., at 668, 10 L.Ed.2d 52". (Emphasis is the Supreme Court's) *United States v. SCRAP, supra,* 697-698.

Here again, it is evident that the rationale of this policy consideration is directed toward proceedings affecting *rate levels* and the *timing* of *rate changes.* No *rates* are involved in this instant proceeding. All the cases denying review of ICC rate cases have focused on alterations in actual rates. Even *Port of New York Authority v. United States,* 451 F.2d 783 (2d Cir. 1971), relied on in part by this Court in *SCRAP,* dealt with an attempt to have the Court review the Commission's refusal to suspend a *rate level change,* not a change in a classification description.

The impact of NEPA is so great and its influence so pervasive, as this Court has held repeatedly, that it is unrealistic to expect that this single example of major Federal action by the Commission would be uniquely immune from its effects simply because of a wish to preserve the Commission's ideas of the timing of the effectiveness of a change in Classification description. So to hold, we respectfully submit, would be a classic instance of allowing the exception to swallow the rule.

II. *The decision below in the form of a one sentence pronouncement rather than a reasoned decision, was totally unfair to Petitioner and fosters confusion as to the significance of P.L. 93-584 relative to appeals of ICC orders. The Supreme Court should, therefore, exercise its power of supervision and conclusively determine, in a reasoned opinion, the merits of the issue presented by Petitioner.*

The National Barrel and Drum Association is a trade association of approximately 175 drum reconditioners throughout the United States consisting of corporate as well as sole proprietorship members. NBDA represents approximately 85% of the steel drum reconditioning industry in the United States. The continued effectiveness of the involved ICC tariff classification will force the collapse of an entire industry. This will occur because of the fragility of the new thin-walled drums. Simply put, the thinner the metal used to construct the drums, the greater the possibility of the drums failing and spilling their contents in the stream of interstate commerce. Even the ones which do not fail, cannot be reconditioned at all. Without any drums to recondition, NBDA member companies will have to terminate their businesses.

There has been a steadily declining inventory of used, reconditionable all-18-gauge drums for several years. The chief reason is the increased manufacture and use of light gauge non-reconditionable drums. Until fifteen years ago the vast majority of 55-gallon, tight-head steel drums manufactured were of all-18-gauge construction. Presently 52% are partly 18-gauge and partly lighter, 20-gauge construction. While the all-18-gauge drum can be reconditioned an average of eight times, the 20/18-gauge drum can be reconditioned only two or three times.

The new all-20-gauge steel drum permitted in interstate commerce by the classification description change involved in this proceeding as a practical matter, cannot be reconditioned at all. Permitting the proposed Supplement to become effective will stimulate the use of these light-gauge steel drums, because of their lower cost of manufacture, their cheaper initial price and, to some users at least, the convenience of avoiding deposits and returns to

reconditioners. Experience has shown that, in the packaging industry, minimum transportation specifications quickly become maximum production standards. The available inventory of raw material will dry up and an entire industry will disappear.

Precinding from consideration of the immediate and adverse effect on the environment this proliferation of unreconditionable drums will have, we believe that any judicial action with a potentially fatal effect on an endangered industry should be taken only after a measured and deliberate review of the issues whose resolution will result in life or death for that industry. Yet, this industry is condemned to economic extinction, or at best, crippling shrinkage, by a single sentence denial of a Petition for Review.

We believe that it is unjust for the Court of Appeals to cast to the wind by a one sentence dictate, the fate of an entire U.S. industry. Certainly the foundation of our judicial system has as one of its underpinnings the concept that the judicial determination of the rights and obligations of the parties before the judiciary will be resolved in a reasoned opinion, at least explaining to the unsuccessful litigant *why* he lost. In this case, in light of the recent amendment to the Hobbs Act which renders inapplicable the policy considerations of *SCRAP* and *Arrow*, Petitioner is at a complete loss to understand *why* its contentions are not even worthy of discussion.

While the Court of Appeals may have been wholly within the letter of the law in issuing such an "opinion", Petitioner and its member companies, nonetheless, believe such a decision unfairly determines the future course of this entire industry. Curiously enough, the briefs in opposition relied entirely on the law *prior* to the enactment of the particular

amendment to the Hobbs Act with which we are concerned. To focus on the case law prior to the amendment to the Hobbs Act in P.L. 93-584 is to miss the premiere issue in this case, i.e., the right to secure the benefit of judicial review of the ICC compliance with NEPA in the involved tariff description action where no underlying rationale for non-reviewability of this case exists.

The amendment to the Hobbs Act by P.L. 93-584 is a significant new piece of legislation in the area of judicial review of ICC orders. To peremptorily ignore it only works to further complicate this area of administrative law rather than to simplify it as was intended by P.L. 93-584.

Accordingly, we request that the Supreme Court accept this case for review so that the unanswered legal questions presented by this controversy can be fairly reviewed and the merits determined in a reasoned opinion. If this industry *must* go out of business it would at least like to know *why*.

CONCLUSION

Since the possibility of diverse results no longer prevents the Court's review of the ICC's action in this case, there is no longer any obstacle to prevent enforcement of the requirements of NEPA. For although we acknowledge that the ICC retains the original or primary jurisdiction to analyze and determine whether a classification description change comports with the Interstate Commerce Act, it is the Courts which have the authority to review and find whether or not such an action by the ICC is in compliance with NEPA. The Courts have consistently held that NEPA is *not* left to the discretion of the agencies, but rather that these rules must be strictly complied with and that the manner and substance of

such compliance *will be reviewed* by the Courts. See, *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

In light of the recent amendment to the Hobbs Act and in the absence of any of the three policy considerations mentioned in *SCRAP* and *Arrow* it would be unjust and contrary to the practice of judicial oversight of administrative agencies to withhold the benefits of judicial review from Petitioner.

We believe, moreover, that the perfunctory dismissal of this case on both the administrative and judicial levels works an injustice upon NBDA and its member companies, putting them out of business without even knowing why.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the District of Columbia.

Respectfully submitted,

NATIONAL BARREL AND DRUM ASSOCIATION, INC.

By _____
William R. Connole

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_____
Ernest C. Baynard, III

27 May 1977

_____
Robert J. Grady

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for a Writ of Certiorari were served this 27th day of May 1977, by hand to the Office of the General Counsel, Interstate Commerce Commission of the United States, Constitution Avenue and 12th Street, N.W., Washington, D.C. 20423; by mail to the National Motor Freight Traffic Association, Inc., 1616 P Street, N.W., Washington, D.C. 20036; the National Classification Board and the National Classification Committee, at 1616 P Street, N.W., Washington, D.C. 20036; the Office of General Counsel, Council of Environmental Quality, 722 Jackson Place, N.W., Washington, D.C. 20006; the Office of General Counsel, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20410; the United States Attorney, United States Court House, Washington, D.C. 20001; the Solicitor General of the United States, Department of Justice, Constitution Avenue between 9th and 10th Sts., Washington, D.C. 20530; and the Steel Shipping Container Institute, 2204 Morris Avenue, Union, New Jersey 07083. All parties required to be served have been served.

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William R. Connole

APPENDICES

APPENDIX

A. Statutory Provisions Involved

B. Existing Description of Steel Drums and Proposed Supplement

C. Disposition Bulletin No. 291 of National C

D. Notice of Division 2 of Interstate Commerce Commission of Decision in Suspension Case No. 65597

E. Opinion of Court of Appeals for the District of Columbia Denying Petitioner's Request for Review and Petitioner's Motion for a Preliminary Injunction

F. Opinion of Court of Appeals for the District of Columbia Denying Petitioner's Motion for Rehearing

APPENDIX A

STATUTORY PROVISIONS INVOLVED

Energy Policy and Conservation Act, 42 U.S.C. § 6362(b):

Except as provided in subsection (c), each of the agencies specified in subsection (a)(1) (which includes the ICC) shall, where practicable and consistent with the exercise of their authority under other law include in any major regulatory action (as defined by rule by each such agency) taken by each such agency, a statement of the probable impact of such major regulatory action on energy efficiency and energy conservation.

National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c):

[A]ll agencies of the Federal Government shall–(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Interstate Commerce Act Section 216(g);
216 (g); 49 U.S.C. 316(g):

(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge or the value of the service thereunder, the Commission is authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice and pending such hearing and the decision thereon the Commission by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: Provided, That this subsection shall not apply to any initial schedule or schedules

filed on or before July 31, 1938, by any such carrier in bona fide operation on October 1, 1935. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

Interstate Commerce Act Section 15(7);
49 U.S.C. § 15(7)

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within

the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. Feb. 4, 1887, c. 104, Pt. I, §15, 24 Stat. 384; June 18, 1910, c. 309, §12, 36 Stat. 551; Feb. 28, 1920, c. 91 §418, 41 Stat. 484; Mar. 4, 1927, c. 510, §2, 44 Stat. 1447; Sept. 18, 1940, c. 722, Title I, §10(c), 54 Stat. 912.

Title 28 U.S.C. § 2325:

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 970. *Repealed.* Pub. L. 93-584 §7, Jan. 2, 1975, 88 Stat. 1918.

Title 28 U.S.C. § 2321:

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in the cases and proceedings under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43), run, be served and be returnable anywhere in the United States.

As amended Jan. 2, 1975, Pub. L. 93-584, §5, 88 Stat. 1917.

Title 28 U.S.C. § 2349(a):

The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

ITEM 260-A

SPECIFICATIONS FOR ALUMINUM BARRELS OR DRUMS AND STEEL BARRELS, DRUMS, BUCKETS, FIRKINS, KITS OR PAILS

(a) Barrels, buckets, firkins, drums, kits or pails must comply with the following requirements, except single trip containers as provided in paragraph (5). Regulations of the DOT for the transportation of explosives and other dangerous articles (see DAT) by freight and the specifications of the shipping containers thereof must be observed.

Rated (marked) capacity of steel barrels, drums buckets, firkins, kits or pails See Note 5	MINIMUM THICKNESS OF STEEL, U.S. STANDARD GAUGE	
	For dry or solid articles other than single trip (Note 1)	For other than dry or solid articles Note 1
Under 5 gallons capacity	28 gauge	26 gauge (Note 7)
5 gallons to and including 7 gallons capacity (Note 2). Item 255	26 gauge	26 gauge (Notes 4 & 7)
Over 7 gallons to and including 10 gallons capacity	26 gauge	22 gauge (Note 4)
Over 10 gallons to and including 20 gallons capacity	24 gauge	20 gauge (Note 4)
Over 20 gallons to and including 35 gallons capacity	23 gauge	20 gauge (Note 4)
Over 35 gallons to and including 57 gallons capacity	22 gauge	18 gauge (Notes 2, 3, 4, & A6)
Over 57 gallons to and including 75 gallons capacity	20 gauge	16 gauge (Note 8)
Over 75 gallons to and including 110 gallons capacity	20 gauge	14 gauge
Over 110 gallons but not exceeding 165 gallons capacity	18 gauge	12 gauge
All steel drums, buckets, firkins, kits, or pails for other than dry or solid articles must have side seams welded.		

Note 3–Steel drums over 35 gallons to and including 57 gallons rated (marked) capacity, see Note 5, having 20 gauge sides and 18 gauge ends may be used as stopping containers for other than dry or solid articles, see Note 1. Drums must have two or more expanded rolling hoops in the side-wall.

Item 260 as published within Supplement 10 to become effective October 8, 1976:

ITEM 260-B

SPECIFICATIONS FOR ALUMINUM BARRELS OR DRUMS AND STEEL BARRELS, DRUMS, BUCKETS, FIRKINS, KITS OR PAILS

(a) Barrels, buckets, firkins, drums, kits or pails must comply with the following requirements, except single trip containers as provided in paragraph (b). Regulations of the DOT for the transportation of explosives and other dangerous articles (see DAT) by freight and the specifications of the stripping containers thereof must be observed.

Rated (marked) capacity of steel barrels, drums buckets, firkins, kits or pails See Note 5	MINIMUM THICKNESS OF STEEL, U.S. STANDARD GAUGE	
	For dry or solid articles other than single trip. Note 1	For other than dry or solid articles Note 1
Under 5 gallons capacity	28 gauge	26 gauge (Note 7)
5 gallons to and including 7 gallons capacity (Note 2). Item 255	26 gauge	26 gauge (Notes 4 & 7)
Over 7 gallons to and including 10 gallons capacity	26 gauge	22 gauge (Note 4)
Over 10 gallons to and including 20 gallons capacity	24 gauge	20 gauge (Note 4)
Over 20 gallons to and including 35 gallons capacity	23 gauge	20 gauge (Note 4)
Over 35 gallons to and including 57 gallons capacity	22 gauge	20/18 gauge (Notes 2, 3, 4, & 6)
Over 57 gallons to and including 75 gallons capacity	20 gauge	16 gauge (Note 8)
Over 75 gallons to and including 110 gallons capacity	20 gauge	14 gauge
Over 110 gallons but not exceeding 165 gallons capacity	18 gauge	12 gauge
All steel drums, buckets, firkins, kits, or pails for other than dry or solid articles must have side seams welded.		

Note3–Steel drums over 35 gallons to and including 57 gallons rated (marked capacity, see Note 5, having 20 gauge sides and 20 gauge ends may be used as shipping containers for other than dry or solid articles, see Note 1. Drums must have two or more expanded rolling hoops in the side-wall. Drums having 20 gague bottoms must have 3/4 inch depth at the chime and 5/8 inch minimum convexity at the center. Drum bottom must have either a 10 inch diameter flat center panel or a 4 inch diameter flat center panel. Drum bottoms with 4 inch panels must also be embossed with a circumferential bead or rib near the chime radius.

APPENDIX C

NOTICE OF DISPOSITION
ISSUED PURSUANT TO RULES OF PROCEDURE

NATIONAL CLASSIFICATION BOARD
of the Motor Carrier Industry
1616 P Street, N.W.
Washington, D.C. 20036
(202) 797-5318

Disposition Bulletin No. 291

June 10, 1976

There are set forth below the disposition of various subjects listed on the dockets of the National Classification Board.

Recommended changes or additions will be published in a supplement to the National Motor Freight Classification scheduled to be issued on or about *August 6, 1976,* with an effective date not sooner than *September 10, 1976,* unless such action is stayed by appeal within 30 days from the date shown on this bulletin.

Appeals may be perfected by written request to the Secretary to the National Classification Committee from any of the following: (1) the proponent of the proposal; (2) fifteen participating motor carriers in the Classification; or (3) eight members of the National Classification Committee.

Correspondence concerning matters contained herein should refer to the Disposition Bulletin number and the Docket and Subject numbers.

NATIONAL CLASSIFICATION BOARD

cc: J.C. Harkins, Issuing Officer
All Parties of Record

DISPOSITION	PUBLICATION REQUIRED	LTL	TL	MWF
DOCKET SUBJECT				
762 7	Amend the Classification to read:			
Approve as	BOILERS GROUP, subject to item 25400:			
Modified (New)	Heaters, railway switch, oil burning:			
(6562) Sub 1	Stationary, with motor operated blower,			
	in packages.	100	50	24.2
Sub 2	NOI, in boxes or crates	60	40	36.2

JUSTIFICATION:
To re-establish provisions that were previously cancelled as obsolete and provide ratings reflective of known transportation characteristics.

762 14	
Disapprove	None(Containers, bulk commodity shipping, old, used)

JUSTIFICATION:
Facts of record not shown to warrant proposed.

761 31	Amend the Classification to read:
Approve as Modified (6563)	

ITEM 260

SPECIFICATIONS FOR ALUMINUM BARRELS OR DRUMS AND STEEL BARRELS, DRUMS, BUCKETS, FIRKINS, KITS OR PAILS

(a) Barrels, buckets, firkins, drums, kits or pails must comply with the following requierments, except single trip containers as provided in paragraph (b) Regulations of the DOT for the transportation of explosives and other dangerous articles (see DAT) by freight and the specifications of the shipping containers thereof must be observed.

Rated (marked) capacity of steel barrels, drums buckets, firkins, kits or pails See Note 5	MINIMUM THICKNESS OF STEEL, U.S. STANDARD GAUGE	
	For dry or solid articles other than single rip. Note 1	For other than dry or solid articles Note 1
Under 5 gallons capacity	28 gauge	26 gauge (Note 7)
5 gallons to and including 7 gallons capacity (Note 2). Item 255	26 gauge	26 gauge (Notes 4 & 7)
Over 7 gallons to and including 10 gallons capacity	26 gauge	22 gauge (Note 4)
Over 10 gallons to and including 20 gallons capacity	24 gauge	20 gauge (Note 4)
Over 20 gallons to and including 35 gallons capacity	23 gauge	20 gauge (Note 4)
Over 35 gallons to and including 57 gallons capacity	22 gauge	20/18 gauge (Notes 2, 3, 4, & 6)
Over 57 gallons to and including 75 gallons capacity	20 gauge	16 gauge (Note 8)
Over 75 gallons to and including 110 gallons capacity	20 gauge	14 gauge
Over 110 gallons but not exceeding 165 gallons capacity	18 gauge	12 gauge
All steel drums, buckets, firkins, kits, or pails for other than dry or solid articles must have side seams welded.		

ITEM 260 (continued)

Capacity of aluminum barrels or drums with or without steel jackets	MINIMUM THICKNESS OF ALUMINUM, B & S GAUGE	
	Sides	Ends
To and including 10 gallons capacity	16 gauge	16 gauge
Over 10 gallons to and including 35 gallons capacity	14 gauge	14 gauge
Over 35 gallons to and including 55 gallons capacity	10 gauge	10 gauge
Over 55 gallons to and including 110 gallons capacity	8 gauge	8 gauge

Paragraphs (b) through (e) –No change.

Notes 1 and 2 –No change.

Note 3–Steel drums over 35 gallons to and including 57 gallons rated (marked) capacity, see Note 5 having 20 gauge sides and 20 gauge ends may be used as shipping containers for other than dry or solid articles, see Note 1. **Drums must have two or more expanded rolling hoops in the sidewall. Drums having 20 gauge bottoms must have 3/4 inch draw depth at the chime and 5/8 inch minimum convexity at the cneter. Drum bottom must have either a 10 inch diameter dropped flat center panel or a 4 inch diameter dropped flat center panel. Drum bottoms with 4 inch dropped panels must also be embossed with a circumferential bead or rib near the chime radius.**

Notes 4 through 8–No change;

(continued)

DISPOSITION ITEM PUBLICATION REQUIRED LTL TL MWF

DOCKET SUBJECT

761 31 **JUSTIFICATION:** Item 260 is being amended to allow for shipment of commodities in 20 gauge steel drums of 55 gallon capacity justified by the advances made within the steel industry in supplying a more uniform product for drum manufacture, by laboratory tests conducted prior to the issuance of Test Shipment Permits and the experience obtained while moving under Permits. Consideration has been further given to the drums ability to be reconditioned and its overall effect upon our environment in terms of energy and solid waste.

a–13 (Concluded)

(FINIS)

APPENDIX D

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D.C. 20423

Suspension Case No. 65597

October 7, 1976

NOTICE :

Division 2, acting as an appellate division, Commissioners Hardin, O'Neal, and Christian, voted today not to suspennd protested schedules naming a changed motor common carrier classification provision providing for the use of steel drums, with 20 gauge sides and 20 gauge ends, that are over 35 gallons to and including 57 gallons rated (marked) capacity, to be used as shipping containers for other than dry or solid articles, with nationwide application, as published in Supplement 10 to Tariff ICC NMF 100-C of the National Motor Freight Traffic Association, Inc., Agent, Washington, D.., scheduled to become effective October 8, 1976. Commissioner Christian did not participate.

The Suspension and Fourth Section Board, Members Fitzgerald, Babst, and Halvarson, had concluded not to suspend the protested schedules, and the action of Division 2 followed the filing of an appeal for reconsideration of the Board's action. Member Halvarson had not participated.

Robert L. Oswald
Secretary

APPENDIX E

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 76–2091 **September Term, 1976**

National Barrel and Drum Association, Inc.,

Petitioner

v.

Interstate Commerce Commission and United States of America,

Respondents

Steel Container Institute

Intervenor

FILED – FEBRUARY 4, 1977

BEFORE: MacKinnon and Robb,
Circuit Judges

O R D E R

On consideration of petitioner's motion for preliminary injunction, of respondents' motion to dismiss petition for review and of responese filed with respect to the foregoing motions, it is

ORDERED by the Court that responsents' aforesaid motion is granted and the petition for review herein is dismissed.

IT IS FURTHER ORDERED by the Court that petitioner's motion for preliminary injunction is denied as moot.

Per Curiam

APPENDIX F

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 76–2091 **September Term, 1976**
FILED–MARCH 15, 1977

National Barrel and Drum Association, Inc.,
Petitioner

v.

Interstate Commerce Commission and United States of America,
Respondents

Steel Container Institute
Intervenor

BEFORE: MacKinnon and Robb, Circuit Judges

O R D E R

On consideration of petitioner's petition for rehearing of this Court's decision granting respondent's motion to dismiss the petition for review, it is

ORDERED by the Court that petitioner's aforesaid petition for rehearing is denied.

Per Curiam